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ATTORNEY GENERAL

Office of the Attorney General
State of Texas

February 12, 1991

Mr. Max J. Werkenthin, III
Attorney
The University of Texas System
201 West 7th Street
Austin, Texas 78701

OR91-084

Dear Mr. Werkenthin:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 11358.

The Office of General Counsel of the University of Texas System received a request for information concerning the conveyance and disposition of certain university-owned real property in Galveston County known as the Huntington Tract. Specifically, the requestor seeks access to records of sale for portions of the tract already sold and to an agreement granting an option to purchase the remainder of the tract. You inform us that the university system has agreed to supply all the information requested with the exception of the option agreement, which you contend is excepted from disclosure by section 3(a)(3) of the Open Records Act. Alternatively, you argue that if the option agreement is not excepted in its entirety, then portions of it may be excepted by sections 3(a)(3) or 3(a)(5) of the act.

Section 3(a)(3) of the Open Records Act excepts from public disclosure information relating to litigation to which the governmental body (or its officers or employees) is or may be a party. See Heard v. Houston Post Co., 684 S.W.2d 210 (Tex. App. - Houston [1st Dist.] 1984, writ ref'd n.r.e.). To establish this exception the governmental body must show (1) that litigation is pending or reasonably anticipated and (2) that the requested information relates

to that litigation. Id. The second prong of the section 3(a)(3) test is satisfied if the governmental body reasonably establishes the relationship of the subject matter of the requested information to the litigation. Open Records Decision No. 551 (1990).

With respect to the first part of the test, you explain that the university system is presently engaged in a dispute with several taxing units over the imposition of "rollback" taxes against the property covered by the option agreement. From your letter and attachments, it is apparent that the property was previously appraised as agricultural land under the "open-space" method of appraisal authorized by article VIII, section 1-d-1, of the Texas Constitution. See Tax Code §§ 23.51 - 23.56. The imposition of rollback taxes is based on the determination that a change in use of the property occurred within the meaning of section 23.55 of the Tax Code, thereby creating a liability for the rollback taxes.

You advise that the university system disputes the imposition of these taxes and has attempted, to no avail, to reach an agreement with the various taxing units. In this regard, you state:

Since no agreement with the taxing authorities appeared to be possible, the Office of General Counsel has given notice to the taxing authorities of the Board of Regents' intention to file a lawsuit to settle the disputed taxes.

Later in your letter you state that the taxing units have been notified that "the U.T. System protests the assessment and will institute suit if collections efforts are not halted." To demonstrate that litigation is reasonably anticipated in this matter, you provided copies of two letters, one dated October 20, 1989, from the Office of General Counsel protesting the imposition of rollback taxes by one of the taxing units and another dated December 12, 1990, from a law firm employed by another of the taxing units to collect its taxes.

This office has consistently held that a mere threat to file suit, without more, is insufficient to trigger the protection of section 3(a)(3). See Open Records Decision Nos. 351, 331, 311 (1982); 288 (1981); 183 (1978). However, where there exists a genuine and continuing dispute between the governmental body and another party, a letter demanding

payment and threatening further legal action if the demand is not met is sufficient to establish that litigation is reasonably anticipated. Open Records Decision No. 346 (1982).

From the evidence supplied with your letter, we are not immediately persuaded that litigation is reasonably anticipated in this matter. As noted above, you state that it is the intention of the Board of Regents, rather than the taxing units, to file a lawsuit in this matter. The letter written by the Office of General Counsel, however, makes no mention whatsoever of any such determination on the part of the Board of Regents. The letter merely expresses disagreement over the imposition of taxes on the basis of change in use and describes the land's current agricultural use. Neither does the letter disclose whether the taxing unit had threatened or initiated litigation. The second letter notifies the Board of Regents that taxes due another of the taxing units had been referred to the law firm for collection. It advises that a tax suit is an option, but does not otherwise indicate that the taxing unit intends to commence litigation to collect the taxes. In the absence of more concrete evidence demonstrating that litigation is reasonably anticipated in this matter, no portion of the option agreement may be withheld under section 3(a)(3).

You also contend that part of the option agreement is excepted from public disclosure by section 3(a)(5) of the Open Records Act. That section protects

information pertaining to the location of real or personal property for public purposes prior to public announcement of the project, and information pertaining to appraisals or purchase price of real or personal property for public purposes prior to the formal award of contracts therefor.

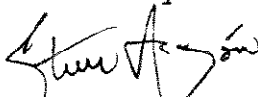
Section 3(a)(5) is designed "to protect a governmental body in its planning and negotiating position in regard to particular transactions." Open Records Decision No. 222 (1979). It will remain applicable until negotiations and the transaction have been completed, at which time the information becomes public. Id. See also Open Records Decision Nos. 348 (1982); 265 (1981); 234 (1980).

You inform us that the Board of Regents is obligated under the option agreement to clear title to three outlots within the boundaries of the Huntington Tract that are

claimed to be owned by third parties. The Board is currently engaged in negotiations with these third parties to purchase their interests in the properties. Clearly, disclosure of the option price and the purchase price for the Huntington Tract contained in the option agreement would damage the Board's interests in the negotiations with the third parties who claim ownership of land within the Huntington Tract. Accordingly, the information relating to the option price and the purchase price (as reflected in paragraphs 3 and 15 of the option agreement) may be withheld from disclosure under section 3(a)(5) until negotiations for the three disputed outlots are completed.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR91-084.

Yours very truly,



Steve Aragon
Assistant Attorney General
Opinion Committee

SA/lcd

Ref.: ID# 11358

cc: Mr. Bruce Halford
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